Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-838

JOHN D. PAGE and DON THOMAS,
Petitioners,

v.

U. S. INDUSTRIES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 556 F.2d 356 and is reprinted as Appendix E of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in No. 77-595 heretofore filed with this Court. The opinions of the United States District Court for the Southern District of Texas are reprinted as Appendices A, B, C and D of the same Petition.

JURISDICTION

As set out below in Reasons for Denying the Writ, Petitioner has failed to satisfy the jurisdictional requirements of 28 U.S.C. § 2101(c) and accordingly, jurisdiction over this Petition for a Writ of Certiorari does not exist.

QUESTIONS PRESENTED

1. Whether Petitioner has satisfied the jurisdictional requirements of 28 U.S.C. § 2101(c) and the Rules of the Court for filing a Petition for a Writ of Certiorari.

2. If so, whether the decision of this Court in *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), holding that the filing of a charge of employment discrimination with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, does not toll the running of the statute of limitations applicable to an action under 42 U.S.C. § 1981, was properly given retroactive effect by the court of appeals.

STATEMENT OF THE CASE

This Petition for a Writ of Certiorari relates soleiy to one part of a decision of the court of appeals rendered on July 25, 1977. The court of appeals had accepted an interlocutory appeal to review an order of the district court which held that Petitioner John D. Page's alleged Title VII action could be maintained even though it was not filed within the statutory 90-day period and that the limitations period applicable to Petitioners' cause of

action under 42 U.S.C. § 1981 was tolled by the filing of a charge of discrimination under Title VII despite this Court's decision in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). The court of appeals rendered its decision on July 25, 1977, reversing the district court and holding that the *Johnson* decision was applicable to the instant case and that Petitioners' cause of action under 42 U.S.C. § 1981 was limited to allegations of occurrences or events which occurred within the applicable limitations period (two years) prior to the filing of Petitioners' complaint in district court. It is from this holding by the court of appeals that Petitioners seek a Writ of Certiorari.

In a separate part of its decision, the court of appeals affirmed the district court and held that Petitioner John D. Page could maintain a Title VII action based upon a charge of discrimination filed in April, 1969, even though Petitioners' complaint was not filed within the 90-day period set out in Title VII, 42 U.S.C. § 2000e-5(f)(1). Respondent herein filed a timely petition for rehearing and suggestion for rehearing en banc of that part of the decision of the circuit court. Respondent's motion was denied and Respondent filed a timely Petition for Writ of Certiorari, Docket No. 77-595, as to that part of the decision.

REASONS FOR DENYING THE WRIT

I.

Petition for Writ of Certiorari Not Timely

The time period for filing a petition for a writ of certiorari in a civil action, as mandated by Congress, is set

out in 28 U.S.C. § 2101(c). That statutory provision establishes a period of 90 days from the entry of judgment or decree in a civil action in which a petition for a writ of certiorari must be filed. As reflected by Appendices E and F to the Petition for a Writ of Certiorari in No. 77-595 and as conceded by Petitioners in the instant Petition, the court of appeals entered its decision reversing the district court with respect to Petitioners' § 1981 cause of action on July 25, 1977.

The July 25, 1977 decision of the circuit court pertaining to the parties involved in this petition for a Writ of Certiorari was divided into two parts. Part A of the decision related solely to the timeliness of the filing of Petitioner John D. Page's Title VII action. Part B of the decision related solely to the limitations period applicable to Petitioners' § 1981 cause of action. Part A (the Title VII issue) was decided favorably to Petitioners herein while Part B (the § 1981 issue) was decided unfavorably to Petitioners herein. Respondent filed a timely Motion for Rehearing as to Part A (the Title VII issue) of the decision of the court of appeals and, following denial of that motion, filed a timely Petition for a Writ of Certiorari to review that portion of the decision of the court of appeals. Petitioners herein never filed a Motion for Rehearing of Part B (the § 1981 issue) of the decision of the court of appeals nor did Petitioners seek an extension of time in which to file a Petition for a Writ of Certiorari to seek review of Part B of the decision of the court of appeals.

It is axiomatic that where a decision of an appellate court contains two or more parts, the time for filing a Petition for a Writ of Certiorari on one part runs independently from the other parts of the decision. *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952). The Petitioners now seek a Writ of Certiorari to review Part B of the decision of the court of appeals rendered on July 25, 1977 and the time for filing such a writ expired on October 24, 1977, almost two months before Petitioners filed this Petition. This Court should deny Petitioner's Petition for Writ of Certiorari as failing to satisfy the jurisdictional requirements for filing the petition.

II.

There is No Conflict Among the Circuits

Petitioners seek a Writ of Certiorari to review that part of the court of appeals' decision which held that this Court's decision in *Johnson v. Railway Express Agency, Inc., supra,* was to be applied to cases pending at the time that decision was rendered. In *Johnson* this Court held that § 1981 created a separate and independent cause of action from Title VII and that the limitations period applicable to a § 1981 cause of action could not be tolled by the filing of a charge of discrimination under Title VII. Petitioners assert that the court of appeals was in error in giving retroactive application to the *Johnson* decision. Petitioners further assert that the court of appeals was in error in its application of the criteria set out in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), in reaching its conclusion that *Johnson* was applicable to cases pending at the time that decision was rendered.

The court of appeals carefully considered the criteria established by this Court in *Chevron Oil Co. v. Huson, supra,* in concluding that *Johnson* was to be given retro-

active application in its prior decision in *Williams v. Phil Rich Fan Mfg. Co.*, 552 F.2d 596 (5th Cir. 1977). See, also, *Cutliff v. Greyhound Lines*, 558 F.2d 803 (5th Cir. 1977); *Dupre v. Hutchins Bros.*, 521 F.2d 236 (5th Cir. 1975). Petitioners erroneously assert that the *Chevron* criteria are weighed or balanced against each other in arriving at a conclusion as to whether or not a decision is not to be given retroactive application. *Chevron* makes it clear that all three criteria must be satisfied before a decision will not be given retroactive application. The court of appeals properly concluded that the purpose of the *Johnson* decision would not be furthered by withholding retroactive application and correctly applied *Johnson* to cases then pending in the circuit.

Every other court of appeals which has been presented the issue has also concluded that *Johnson* is to be applied retroactively. *Cates v. Trans-World Airlines*, 561 F.2d 1064 (2d Cir. 1977); *King v. Seaboard Coast Line R.R. Co.*, 538 F.2d 581 (4th Cir. 1977); *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976); *Green v. Carter Carburetor Co.*, 532 F.2d 125 (8th Cir. 1976). There is no conflict among the circuit courts nor with decisions of this Court as to the retroactive application of *Johnson*. As observed by the court in *Cates v. Trans-World Airlines, supra:*

> "The Supreme Court is well aware of how to avoid the effects of applying one of its rulings retroactively to the case at bar. Yet in *Johnson,* the Court chose to apply its ruling that § 1981 statutes of limitations are not tolled by timely filed EEOC charges to the facts at hand, despite its awareness that this would preclude petitioner there from obtaining any relief since his Title VII claims were also time-barred. 421 U.S. at 466." 561 F.2d 1064

The question as to retroactive application of *Johnson* was decided by this Court when it applied its decision retroactively and the courts of appeal have uniformly applied the decision retroactively. The Court should deny Petitioners' Petition for Writ of Certiorari as there is no conflict of decisions among the circuits. Rather, the circuits have uniformly applied the no-tolling principle announced in *Johnson* in the same manner this Court applied that principle in the *Johnson* decision.

CONCLUSION

For the foregoing reasons, Respondent submits that this Petition for Writ of Certiorari must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this _____ day of January, 1978, copies of the foregoing Brief of Respondent in Opposition were served upon Carol Nelkin, Nelkin & Nelkin, 5417 Chaucer, Houston, Texas 77005, Attorney of Record for Petitioners, and upon James R. Watson, Jr., Bray and Watson, 500 Texas Professional Tower Building, 608 Fannin Street, Houston, Texas 77002, Attorney of Record for International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, AFL-CIO, and its affiliate Local 561 by depositing the same in the United States Mail, postage prepaid, certified, return receipt requested.

SAMUEL E. HOOPER